No. 89-1240

MAR 23 1990
JOSEPH F. SAPNIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

ANTHONY WAYNE THOMPSON,

Petitioner,

v.

CHERYL L. DUKE, CHESTER J. PUCCI, FLOYD COX, ROBERT GUTHRIE, RITA ALLEN, HAROLD THOMAS, MICHAEL LANE, PAUL J. KLINCAR, PHILLIP T. HARDIMAN, ROY PATRICK, and THE COUNTY OF COOK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF STATE RESPONDENTS DUKE, PUCCI, COX, GUTHRIE, ALLEN, THOMAS, LANE and KLINCAR

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3312

Attorneys for State Respondents

ROSALYN B. KAPLAN*
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3698

Of Counsel

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED:

I. THE FIRST QUESTION PRESENTED IS PREMISED ON A MISSTATEMENT OF THE DECISION OF THE SEVENTH CIRCUIT 5

II. THE FUNCTIONAL ANALYSIS AS APPLIED BY THE SEVENTH CIRCUIT AND OTHER COURTS RENDERS UNNECESSARY A BROAD-BASED DECISION AS TO THE EXTENT OF IMMUNITY GENERALLY AVAILABLE TO PAROLE OFFICERS AND PAROLE OFFICIALS 6

III. PETITIONER'S PRESENTATION OF THE SUBSTANTIVE QUESTION OF STATE RESPONDENTS' LIABILITY IS PREMATURE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Farrish v. Mississippi State Parole Board, 836 F.2d 969 (5th Cir. 1988) 8, 9

Forrester v. White, 484 U.S. 219 (1988) 5, 6, 9

Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983), *cert. denied*, 466 U.S. 949 (1984) 8

Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986) 8

Nelson v. Balazic, 802 F.2d 1077 (8th Cir. 1986) 8

Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981) 7

Tacon v. Arizona, 410 U.S. 351 (1973) 7

Trotter v. Klincar, 748 F.2d 1177 (7th Cir. 1984) 5

United States ex rel. Powell v. Irving, 684 F.2d 494 (7th Cir. 1982) 5, 7

Walker v. Prisoner Review Board, 769 F.2d 396 (7th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) 5

Webster v. Fall, 266 U.S. 507 (1925) 8

Wilson v. Rackmill, 878 F.2d 772 (3d Cir. 1989) 8, 9

Wolfel v. Sanborn, 555 F.2d 583 (6th Cir. 1977) 8

Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir.), *vacated*, 458 U.S. 1102 (1982) 8

Wolfel v. Sanborn, 691 F.2d 270 (6th Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983) 7, 8

No. 89-1240

In The

Supreme Court of the United States

October Term, 1989

ANTHONY WAYNE THOMPSON,

Petitioner,

v.

CHERYL L. DUKE, CHESTER J. PUCCI, FLOYD COX, ROBERT GUTHRIE, RITA ALLEN, HAROLD THOMAS, MICHAEL LANE, PAUL J. KLINCAR, PHILLIP T. HARDIMAN, ROY PATRICK, and THE COUNTY OF COOK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF STATE RESPONDENTS DUKE, PUCCI, COX, GUTHRIE, ALLEN, THOMAS, LANE and KLINCAR

The state respondents, Cheryl L. Duke, Chester J. Pucci, Floyd Cox, Robert Guthrie, Rita Allen, Harold Thomas, Michael Lane, and Paul J. Klincar, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion

in this case. The opinion is reported at 882 F.2d 1180 (7th Cir. 1989).

STATEMENT OF THE CASE[1]

Petitioner, Anthony Wayne Thompson (hereinafter "Thompson"), brought this action pursuant to 42 U.S.C. § 1983 alleging that state respondents Duke, Pucci, Cox, Guthrie, Allen, Thomas, Lane, and Klincar[2] had violated his fourteenth amendment right to due process by failing to conduct, or to provide procedures for, a prompt preliminary parole violation hearing in this case.

In July 1982, Thompson was on parole in Chicago for a theft he had committed in Indiana (A11). He was arrested in Chicago on July 29, 1982, and charged with burglary; the following day he was incarcerated at the Cook County Jail (*id.*).

On July 30, 1982, Thompson appeared with his attorney at a hearing where bond was set at $50,000 and a preliminary hearing was scheduled for August 12, 1982 (App. 2). Also on July 30, Duke, a parole officer employed by the Illinois Department of Corrections (DOC), and

---

[1] References to the record will follow the format set forth in footnote 1 at page 5 of Thompson's petition.

[2] This brief in opposition will be confined to Thompson's federal claims against the state respondents. Thompson also alleged state law causes of action for false imprisonment, which were dismissed by the district court upon its grant of summary judgment on the federal counts (App. 28). The county respondents are separately represented before this Court.

Pucci, a warrant officer and Duke's supervisor, issued a parole violation warrant against Thompson based on his arrest for burglary (A12).

The preliminary hearing was held as scheduled on the burglary charge (A12). Thompson was represented by counsel but presented no witnesses or evidence on his behalf (*id.*; App. 2). The court found that probable cause existed to believe that he had committed the burglary, and it scheduled a trial for September 20, 1982 (A12; App. 2). On August 31, 1982, an information was filed against Thompson charging him with the offense of burglary (A12). Respondents Duke, Pucci, and Guthrie, a hearing officer employed by DOC, scheduled Thompson's preliminary parole violation hearing for September 21, 1982 (*id.*).

Thompson was found not guilty of the offense of burglary on September 20, 1982, and was returned to the Cook County Jail (A12-13).[3] His preliminary parole violation hearing was not held as scheduled,[4] and, on

---

[3] It is not clear when the state respondents first learned of the disposition of the burglary charge (see RG at 43, 48, 56). A finding of not guilty does not automatically mean that a person held on a parole violation warrant must be released (HT at 39-40, CP at 59, RG at 84, 98). Thompson's conclusions in his petition to this Court that his acquittal "obviously" required or "should have resulted in" his release do not address this evidence.

[4] The record does not explain why the hearing was not held as scheduled. Hearing Officer Guthrie explained at his deposition that a hearing officer would try to prioritize work, but that circumstances (*e.g.*, a disturbance at the jail) could prevent him from keeping to his schedule (RG at 58-59, 75, 121-22).

September 25, 1982, while incarcerated in the county jail, Thompson was assaulted by another inmate (A13). Thompson was taken to the Cook County Hospital for medical treatment and remained there until October 19, 1982 (*id.*).

He was then transferred from the hospital to the county jail at which time respondent Cox, also a DOC hearing officer, held a hearing, determined that no probable cause existed to believe that Thompson had violated the conditions of parole and recommended that his parole violation warrant be withdrawn (*id.* at 13, 623.) Thompson was released from jail that same day (A131).

Thompson's complaint alleged that respondents Duke, Pucci, Guthrie, Allen (Interstate Compact Administrator in Illinois),[5] Thomas (Guthrie's supervisor) and Cox violated his due process rights by failing to proceed, or cause others to proceed, with a parole violation hearing prior to the date when he was injured at the Cook County Jail (App. 3; A14-23). With respect to respondent Klincar, Chairman of the Prisoner Review Board (the state agency responsible for the grant, denial or revocation of parole), and respondent Lane, then Director of the Illinois Department of Corrections,[6] Thompson alleged that these respondents had promulgated policies causing the alleged constitutional deprivations that he suffered (A23-26).

---

[5] The Compact transfers the supervision of probationers and parolees between states (RA 7-8).

[6] On January 16, 1990 Michael Lane was succeeded in office by Kenneth L. McGinnis.

In a memorandum opinion dated December 29, 1987, the district court held that the state respondents were absolutely immune from suit, characterizing these respondents' actions as administrative and relying on the holdings of *Walker v. Prisoner Review Board*, 769 F.2d 396 (7th Cir. 1985); *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir. 1984); and *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982) (App. 24-28). After the district court entered its judgment, this Court issued its decision in *Forrester v. White*, 484 U.S. 219 (1988), in which it declined to apply absolute immunity to a judge's decision to discharge his probation officer, describing that act as administrative rather than judicial. Analyzing and applying the *Forrester* decision, the Seventh Circuit rejected Thompson's contention that the duty to schedule and hold a timely preliminary parole revocation hearing was simply an administrative function. Rather, the court of appeals concluded that the duty to schedule and conduct a hearing "is obviously an integral judicial (or quasi-judicial) function subject to absolute immunity" (App. 10).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FIRST QUESTION PRESENTED IS PREMISED ON A MISSTATEMENT OF THE DECISION OF THE SEVENTH CIRCUIT.

In his first question presented to this Court, petitioner posits a conflict between the decision of the Seventh Circuit and this Court's ruling in *Forrester v. White*, 484 U.S. 219 (1988), by characterizing the conduct of the

state respondents as administrative. In fact, the court of appeals directly confronted the question whether the duty to schedule and hold a timely hearing is properly described as administrative or judicial, in view of the reasoning outlined in *Forrester*. A careful analysis of this Court's decision led the Seventh Circuit to re-affirm its earlier holding that activities that are part and parcel of the judicial (or quasi-judicial) process continue to be protected by absolute immunity, and to conclude that the scheduling and conduct of a hearing were an integral part of the judicial function. App. 10-11. Rather than address the reasoning of the Seventh Circuit, petitioner chose simply to assume the opposite conclusion and to frame his issue before this Court in terms of his own evaluation of the respondents' functions. As decided by the court below, this case presents no conflict with the *Forrester* decision.

II. THE FUNCTIONAL ANALYSIS AS APPLIED BY THE SEVENTH CIRCUIT AND OTHER COURTS RENDERS UNNECESSARY A BROAD-BASED DECISION AS TO THE EXTENT OF IMMUNITY GENERALLY AVAILABLE TO PAROLE OFFICERS AND PAROLE OFFICIALS.

Petitioner attempts to minimize the importance of "a parole officer in the Uptown parole office in Chicago, Illinois" as compared to other judicial or quasi-judicial officers long recognized to enjoy absolute immunity for their judicial functions (petition at 18). This superficial distinction does not confront the similarity of functions performed by all such actors, who are necessarily faced with the regular obligation to prioritize cases and deliver

prompt, impartial adjudications based on objective evaluations rather than the fear of litigation. Essentially refusing to acknowledge the purpose of a functional analysis, the petitioner suggests instead that this Court should use this case to decide whether parole officials and officers are generally entitled to absolute or qualified immunity (*id.* at 18-19).

To the extent that petitioner is attempting to isolate and distinguish the complained-of conduct by these state respondents from that of such officials generally, he fails to present a question of such importance as would require the exercise of jurisdiction by this Court. While petitioner also suggests that this Court grant certiorari to resolve a perceived conflict among the circuits as to the extent of immunity to which parole officials are entitled, this latter issue was neither presented to nor decided by the court of appeals in this case.[7] *See Tacon v. Arizona*, 410 U.S. 351 (1973). In any event, the functional analysis that must inform absolute immunity decisions obviates the need, and indeed the possibility, of blanket grants of immunity according to job title.

Petitioner has, moreover, failed to demonstrate a conflict among the circuits that requires the immediate attention of this Court. His reliance on *Wolfel v. Sanborn*, 691

---

[7] The Seventh Circuit has long held that a parole board official should be accorded absolute immunity for his quasi-judicial conduct under the functional analysis mandated by this Court. *United States ex rel. Powell v. Irving*, 684 F.2d 494, 496-97 (7th Cir. 1982) *citing Sellars v. Procunier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981), as well as comparable decisions of the Fourth and Fifth Circuits.

F.2d 270 (6th Cir. 1982), to establish a direct conflict with the Seventh Circuit's opinion in the present case, evidences less of a disagreement between the courts than an effort to infer a conclusion not reached by the *Wolfel* court. The cited decision is the latest of three appellate opinions in that litigation.[8] Read together, these decisions reveal that the issue of absolute immunity was never addressed by the reviewing court and, apparently, was not advanced by the defendants. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The additional cases cited by petitioner are similarly unpersuasive of the existence of a serious conflict that this Court must resolve. In *Wilson v. Rackmill*, 878 F.2d 772 (3d Cir. 1989), *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986), *Farrish v. Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988), and *Nelson v. Balazic*, 802 F.2d 1077 (8th Cir. 1986), the reviewing courts all applied a functional analysis and acknowledged that parole officials were entitled to absolute immunity for their judicial or adjudicative functions. In *Galvan v. Garmon*, 710 F.2d 214 (5th Cir. 1983), the immunity of parole officials was not even addressed, as the issue presented was the level of immunity applicable to a function executed by a *probation officer* who allegedly caused the wrongful arrest and incarceration of a person on probation. Finally, of these five cases,

---

[8] The first and second opinions are published at 555 F.2d 583 (1977) and 666 F.2d 1005, *vacated*, 458 U.S. 1102 (1982), respectively.

three were decided prior to this Court's decision in *Forrester,* and neither the *Wilson* nor the *Farrish* court even considered the possible impact of *Forrester* on the evaluation of the defendants' functions.

Petitioner has not demonstrated a significant conflict among the circuits on the basis of his cited cases. The reviewing courts should be allowed more opportunity to apply the *Forrester* decision before it is determined whether the further guidance of this Court is needed in evaluating particular conduct of quasi-judicial officers.

III. PETITIONER'S PRESENTATION OF THE SUBSTANTIVE QUESTION OF STATE RESPONDENTS' LIABILITY IS PREMATURE.

Because it concluded that the state respondents were entitled to absolute immunity from petitioner's action for damages, the Seventh Circuit did not even find it necessary to address these respondents' alternative claim of qualified immunity, much less consider the merits of petitioner's substantive claim of a deprivation of his constitutional rights by the state actors. Even assuming, *arguendo,* that this Court should choose to entertain a question regarding the absolute immunity of parole officers and officials, and assuming further that the state respondents would then be found not to have absolute immunity under the circumstances of this case, the issue of their substantive liability under the Civil Rights Act would still not be ripe for review before this Court. As was the case in *Forrester,* a remand would be required in order that these remaining questions be addressed in the first instance by the district court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3312

Attorneys for State Respondents.

ROSALYN B. KAPLAN*
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3698

Of Counsel.

*Counsel of Record